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7 Attorneys for Defendant/Counter-Plaintiff,
 8 KEATING DENTAL ARTS, INC.

9
 10 IN THE UNITED STATES DISTRICT COURT
 11 FOR THE CENTRAL DISTRICT OF CALIFORNIA
 12 SOUTHERN DIVISION

13 JAMES R. GLIDEWELL DENTAL
 14 CEAMICS, INC. dba GLIDEWELL
 LABORATORIES,

15 Plaintiff,

16 v.

17 KEATING DENTAL ARTS, INC.

18 Defendant.

19 AND RELATED COUNTERCLAIMS.
 20

) Civil Action No.
) SACV11-01309-DOC(ANx)

) **REBUTTAL EXPERT**
) **REPORT OF DR. DAVID**
) **EGGLESTON**

) Honorable David O. Carter

1 I submit this report as a rebuttal to the September 15, 2012 Expert Report
2 Of David J. Franklin [sic Franklyn] with Appendix I.

3 **I. STATEMENT OF QUALIFICATIONS**

4 My qualifications are set forth in my September 15, 2012 Expert Report.

5 **II. INFORMATION RELIED UPON**

6 The information upon which I am relying includes the information
7 identified in my September 15, 2012 Expert Report and the information
8 identified in my Supplemental Expert Report. I am also relying upon my review
9 of Professor Franklyn's report.

10 **III. OPINIONS TO BE EXPRESSED**

11 **A. Searches of USPTO Databases**

12 Professor Franklyn's report references searches conducted within certain
13 databases of the United States Patent and Trademark Office ("USPTO"). In the
14 course of conducting my dental practice, I have never searched USPTO
15 databases for the purpose of assessing the usage, meaning, or significance of
16 terms by the dental professional community. In my discussions and associations
17 with other dentists, I have never heard of any dentist searching the USPTO
18 databases for the purpose of assessing the usage, meaning, or significance of
19 terms by the dental professional community.

20 **B. Searches of the Online Dental Websites**

21 Professor Franklyn's report references searches done on websites for
22 *Dental Economics*, *Dentistry Today*, and the American Dental Association,
23 concluding that zirconia crowns are commonly referred to as "zirconia crowns"
24 or "all zirconia crowns." This result is not surprising. The goal of these
25 publications is to describe the subject matter in their articles in the clearest
26 manner possible. The terms "zirconia crown" and "all zirconia crown" are
27 concise and clear ways of describing dental restorations made of zirconia.
28

1 **C. Google Searches for “bruxer crown”**

2 Professor Franklyn’s report references Google searches done using the
3 search query “bruxer crown.” Professor Franklyn observes that Google
4 “automatically corrects” the spelling of the search query to “bruxzir crown.”
5 Professor Franklyn then concludes that the resulting search of “bruxzir crowns”
6 leads to five pages of results “clearly referring” to the Glidewell BruxZir
7 product. As a dental professional, I disagree with Professor Franklyn’s
8 conclusion.

9 First, the “automatic correction” observed by Professor Franklyn is a
10 reflection of how widely the dental community uses the term “bruxzir.” While
11 this use certainly includes Glidewell’s use of the name “BruxZir” for its
12 products, it also includes the use of the term “bruxzir” by non-Glidewell authors
13 using the term to refer to a crown or product that is not specific to Glidewell.
14 Both uses contribute to Google’s search results and the resulting “automatic
15 correction” observed by Professor Franklyn.

16 Professor Franklyn also makes the mistake of assuming that every use of
17 the term “bruxzir” in Google’s search results is a reference to a Glidewell
18 product. This is an incorrect assumption. Google’s early search results includes
19 a blog written by Vu Le, known as “The Photodontist,” located at the URL:
20 [http://photodontist.blogspot.com/2009/09/bruxzir-vs-pfm-new-zirconia-vs-](http://photodontist.blogspot.com/2009/09/bruxzir-vs-pfm-new-zirconia-vs-old.html#!/2009/09/bruxzir-vs-pfm-new-zirconia-vs-old.html)
21 [old.html#!/2009/09/bruxzir-vs-pfm-new-zirconia-vs-old.html](http://photodontist.blogspot.com/2009/09/bruxzir-vs-pfm-new-zirconia-vs-old.html#!/2009/09/bruxzir-vs-pfm-new-zirconia-vs-old.html). The blog posting
22 compares two types of crowns: the “old” type of crown, called a “PFM” (a well
23 known acronym for porcelain fused to metal) and a “new” type of crown, called
24 a “Bruxzir” (referred to as a crown made out of zirconia, “a high strength
25 ceramic”). The blog goes on to say that, “the zirconia crowns hold up very well
26 to the PFM crowns that go on 90% of my patients. And compared to a gold
27 crown, they are hugely better. As a matter of fact, this patient chose the zirconia
28 crown.” While the blog does reference Glidewell as the source of this particular

1 zirconia crown, it is readily apparent that the blog author is comparing two
 2 different types of crowns (zirconia vs. PFM) and not two different products
 3 from different sources (e.g., a Glidewell crown vs. a non-Glidewell crown).

4 Google's early search results also includes a forum post from the Dental
 5 Lab Network entitled, "How to glaze a BruxZir crown," located at the URL:
 6 <http://dentallabnetwork.com/forums/f32/how-glaze-bruxzir-crown-4266/>. for
 7 "bruxzir crown." The ongoing discussion is clearly NOT discussing
 8 Glidewell's product, but rather is discussing the glazing of zirconia crowns from
 9 any source (whether or not from Glidewell).

10 **D. Industry Use and Pronunciation of "Brux" "Zir" and "BruxZir"**

11 Professor Franklyn's report also concludes that Barth Dental Laboratories
 12 is seeking to "freeride" off of Glidewell's name in using the term "bruxzir"
 13 crown. Again, to me this appears to be a wrong assumption. I believe Barth
 14 Dental Labs is merely using a commonly used term among dental professionals
 15 for a zirconia restoration for bruxers.

16 The word "bruxer" is commonly and universally used within the dental
 17 profession, including courses taught in dental schools. It is not a slang term.
 18 Slang terms are not allowed in peer-reviewed articles unless they are used with
 19 italics or quotations to identify the word as slang. I previously served as an
 20 Associate Editor of the *Journal of Prosthodontics* and I would not allow an
 21 article to use a slang term without identifying its use with quotations or italics.
 22 The term bruxer is used in many peer reviewed journals and articles without
 23 quotations or italics.

24 Professor Franklyn appears to believe there is a distinct difference in the
 25 pronunciations of "bruxer" and "BruxZir." I do not know why Mr. Franklyn has
 26 this belief, but in my experience talking with dental professionals, the two
 27 words are pronounced identically. I have used the term bruxer in my dental
 28 practice for over 42 years, and while the spelling "BruxZir" is relatively new,

1 every time I have heard it pronounced—including by Glidewell personnel—it is
 2 given the same pronunciation as bruxer. In my review of materials for this case,
 3 I have watched a number of videos produced by Glidewell and other third
 4 parties in the dental industry that use the term “BruxZir.” In each one, the
 5 pronunciation of “BruxZir” is the same as the pronunciation of “bruxer.”

6 Professor Franklyn’s report states that BruxZir is strong “linguistically”
 7 based on a search of the USPTO databases, and he identifies five marks that use
 8 some variation of the root “brux.” As mentioned previously, I am unfamiliar
 9 with the practice of searching the databases of the USPTO, but I know from my
 10 42 years of experience in the dental industry and from my review of materials
 11 for this case that there are products beyond those identified by Professor
 12 Franklyn with names that sound similar to BruxZir that are nowhere mentioned
 13 in his report. Examples include:

- 14 • Archtek Bruxing Splint,
- 15 • Brux XXX,
- 16 • BruxCure,
- 17 • Brux Checker,
- 18 • Dr. Brux,
- 19 • Brux-eze,
- 20 • BruxCare,
- 21 • Bruxguard,
- 22 • ZerisBRUX,
- 23 • Z-Brux,
- 24 • Rbrux,
- 25 • Zir-Bruxer,
- 26 • All Zirconia for Bruxers,
- 27 • Zir-Cast, and
- 28 • Zir-Max.

1
2 It is my opinion that, within the dental industry, dentists are not confused
3 by Keating's use of the mark KDZ BRUXER. Dentists readily recognize the term
4 BRUXER in Keating's mark as identifying a high strength crown for use with
5 bruxers, and not as a misspelling of Glidewell's mark BruxZir.

6 Additionally, dentists recognize the use of "Z" in KDZ bruxer as a
7 reference to zirconia and not as a part of Glidewell's mark BruxZir. There are
8 many products in the dental industry that use "Z," "Zr," or "Zir" to designate a
9 product that includes or is used with zirconia. Several are mentioned above.

10 Professor Franklyn's report states that BruxZir is suggestive of particular
11 qualities or characteristics of the product. To me the name is not merely
12 suggestive of qualities and characteristics, descriptive The name BruxZir,
13 however, is readily understood to describe an all zirconia crown. Within the
14 dental industry, "zir" is immediately understood to be indicating that the product
15 is made from zirconia. Additionally, the term "brux" would readily be
16 understood in the dental industry to identify a product that is useful for treating
17 bruxers, or patients with bruxism. This is evident from the products identified
18 above.

19
20 10/12/12

21 Date

David W. Eggleston

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Dr. David W. Eggleston

PROOF OF SERVICE

I am a citizen of the United States of America and I am employed in Irvine, California. I am over the age of 18 and not a party to the within action. My business address is 2040 Main Street, Fourteenth Floor, Irvine, California. I am readily familiar with the firm's business practices for the collection and processing of correspondence for mailing, and that mail so processed will be deposited the same day during the ordinary course of business.


On October 15, 2012, I caused the within REBUTTAL EXPERT REPORT OF DR. DAVID EGGLESTON to be served on the parties or their counsel shown below, by placing it in a sealed envelope addressed as follows:

Via Electronic and First Class Mail:

Leonard Tachner, Esq.
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I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on October 15, 2012 at Irvine, California.



Claire A. Stoneman

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